

C A S E

O F

Sir ROBERT GORDON, Bart.

(Claiming the Title, Honour and Dignity of)

E A R L of S U T H E R L A N D.

THE *Sutherlands*, Earls of *Sutherland*, were of great Antiquity; but the precise Period when ennobled does not appear from any Record now extant. After many Descents in the Male Line, this Honour came to *John* Earl of *Sutherland*, who died in the Beginning of 1509, leaving Issue, a Son and a Daughter, *John* and *Elizabeth*; which last was, in her Father's Life and about the End of the 15th Century, married to *Adam Gordon*, second Son of *George* Earl of *Huntley*, Chancellor of *Scotland*,—Ancestor to the Duke of *Gordon*. Upon Earl *John*'s Death, his Title and Estate descended of course to his Son *John*, who, being of weak Understanding, was wholly managed by his Brother-in-law *Adam Gordon*; and he, desirous to secure the Estate to his Wife, upon their Brother's Death without Issue, and to prevent his aliening any Part thereof, took out a Writ of Ideocy against him 13 July 1514. In the Course of Proceedings whereon, Earl *John*, in Presence of the Jury, “*palam et judicialiter declaravit, quod Elizabeth Sutherland sua soror-germana et sponsa Adæ Gordon, et suæ proles idone procreati et procreandi, deficientibus hæredibus de corpore suo legitime procreandis, sibi et sui hereditati sunt propriæ et immediatè successur. et post suum decessum eisd. gavisur. et ad hæc suum plenarium consensum prebuit et assensum, prout per tenorem hujus instrumenti animi non variandi prebet,*” (Appendix, No. IV.) and appointed his Brother-in-law *Adam Gordon*, and *John Sutherland*, his Curators for the Management of his Estate. The Writ of Ideocy was prosecuted no farther; and this Earl *John* dying in July 1514, his Sister *Elizabeth* was, the 3d of October following, by the Name of *Elizabeth Sutherland*, served Heir to him in his Estate*.

Soon after his Death the Dignity of Earl of *Sutherland* is found in the Person of *Adam Gordon*.—The Patent of his Creation is not extant; but his Enjoyment of the Rank and Dignity of Earl of *Sutherland* is established by most authentick Evidence. He had one Son *Alexander*, who died before his Father; so *John*, the Son of that *Alexander*, succeeded to the Earldom about the Year 1539, upon the Death of his Grandfather *Adam*.

This Earl *John* is entered in the Parliament Rolls as sitting in Parliament; and is the first Earl of *Sutherland*, who, from the Rolls now extant, appears to have sat in Parliament. He was succeeded by his Son *Alexander*, who, in 1590, was served Heir in General to his Great-Grandfather, therein designed by the Name and Addition of *Adam Earl of Sutherland*, and likewise to *Elizabeth* his Great-Grandmother†.

Earl *Alexander* had two Sons, *John* his Successor in the Earldom, and *Robert* (Great Grandfather of the Petitioner Sir *Robert Gordon*) who was afterwards created the first Baronet of *Scotland*.

In this Earl's Time Commissioners were appointed by the Crown for determining the Precedency in *Parliaments* and *General Councils* of the Peers of *Scotland*.—The Decree of the Commissioners was ratified and confirmed by the King in Council Anno 1617; and the Act of Ratification, in mentioning the Earl of *Sutherland*, enumerates as one of his Dignities that of *Lord Gordon of Dornoch*. Earl *John* was succeeded by his only Son *John*, likewise Earl of *Sutherland*; and he by his only Son Earl *George*.

The Decree of Precedency having reserved Liberty to the Parties interested to sue for an Alteration in due Course of Law, upon producing more antient and authentick Writings, Earl *George* brought an Action for establishing his Precedency before the Earls of *Argyll*, *Crawfurd*, *Errol* and *Marischal*, who had been ranked before him by the Decree: And the Action being moved in Parliament was, by them, remitted to the Decision of the Court of Session, where it was made the principal Point of Dispute, Whether the Earldom of *Sutherland* was held under the original Creation of that Honour, or by a more recent one in the Time of *Adam Gordon* and *Elizabeth* his Wife? The Earl of *Sutherland* contended, that the antient Honour had descended to *Elizabeth*, and was by her transmitted to her Posterity.—The Earls of *Crawfurd*, &c. insisted, that the Earldom of *Sutherland* was descendible only to Heirs Male, and could not therefore descend to *Elizabeth*;—that in Fact *Adam Gordon*, her Husband, was Earl of *Sutherland*; so that there must have been at that Time a new Creation of the Honour in *Adam*'s Person, from which only the Precedency of the Earls of *Sutherland* could be dated.—For colouring the Claim to the ancient Precedency, the Earl of *Sutherland* abandoned the Name and Arms of *Gordon*, which had been borne by all his Ancestors from Earl *Adam* to himself, and assumed the Name and Arms of *Sutherland* borne by the antient Earls till the Time of *Adam*. The Earl of *Sutherland* prosecuted this

* The Proceedings upon the Brieve of Ideocy, as well as this Service, are in the Custody of the Guardians or Agents of Lady *Elizabeth*.

† These two Services likewise in their Custody.

Claim with unwearied Pains and Diligence, and being possessed of all the Family Writings, certainly produced those which any Way tended to support his Claim. No Expence was spared in searching for Instances of Female Succession to Honours. Every Material was collected; and the Facts and Arguments stated on the Earl of Sutherland's Part, with great Judgment and Ability.

But the Court of Session, after a very solemn and accurate Investigation, pronounced the following Judgment.

January 25th, 1706.

1706. Jan. 25th,
Judgment on the
Contest for Pre-
cedency be-
tween the Earl
of Crawford and
the Earl of
Sutherland.

"The Lords find the Documents produced sufficient to instruct the Propinquity of Blood, and Descent of the Dignity from William Earl of Sutherland, Brother-in-law to King David Bruce, to John Earl of Sutherland, served Heir to his Father Earl John Anno 1512, and find it not instructed, by the Documents produced, that the Dignity of John Earl of Sutherland is conveyed to Elizabeth his Sister, served Heir to him in the Estate 1514†." The Earls of Crawford have enjoyed the Precedency ever since.

24 April 1761.

The Earl of Sutherland died in 1733; and was succeeded by his Grandson, William Earl of Sutherland, who died in 1750; and to him succeeded his only Son William, the last Earl of Sutherland, who, by his Contract of Marriage, settled the Estate upon himself, and the Heirs Male of the Marriage, and the Heirs whatsoever of their Bodies; Remainder to the Heirs Male of his Body of any other Marriage, and the Heirs whatsoever of their Bodies; Remainder to the Daughters of the said Marriage, and the Heirs whatsoever of their Bodies; Remainder to the Earl's other Heirs succeeding to him in the Dignity of Earl of Sutherland; and died in 1766, leaving one Daughter, Lady Elizabeth, who takes his Estate without any Controversy.

Claimants of
this Peerage.

Upon his Death, three Claimants petitioned his Majesty for the Title and Dignity of Earl of Sutherland, viz. 1st, Sir Robert Gordon, who claims as Heir Male of Adam Gordon, Earl of Sutherland, and of all the subsequent Earls of Sutherland. His Pedigree is stated in the Appendix, No. 1. with References to the Proof in its Support.

2dly, Lady Elizabeth, who claims as Heir General or of Line to Elizabeth, as Countess of Sutherland, and to all the Earls of Sutherland before and since her Time.

3dly, George Sutherland of Forfe, who claims as Heir Male of the ancient Earls of Sutherland, before the Time of Adam Gordon and Elizabeth.

The three Claimants agree, and it is an unquestionable Fact, vouched by the Records of Parliament, that John Gordon, Earl of Sutherland, the Grandson of Adam, sat in the Parliament of 1543; that he is the first Earl of Sutherland of whose sitting in Parliament any Evidence has been discovered; and that his Heirs Male have continued through the many succeeding Generations to sit in Parliament, and to enjoy without Dispute the Honour and Dignity of Earl of Sutherland.

Sir Robert Gor-
don's Claim.

1. Sir Robert Gordon contends, that Adam Gordon, the Husband of Elizabeth, was created Earl of Sutherland; and that the Dignity has now devolved upon him, as his Heir Male.

Lady Elizabeth's.

2. Lady Elizabeth, claiming under the ancient Creation, contends, that the Peerage of Sutherland came in Course of legal Descent, in July 1514, to Elizabeth Sutherland, as Heir General and of Line to her Brother, John Earl of Sutherland; and that their Right has devolved on her, as Heir General to them.

Mr. Sutherland
of Forfe.

3. Mr. Sutherland of Forfe, claiming also the ancient Honour, insists, that John Gordon, the Grandson of Adam, and all his Successors, sat in Parliament as Earls of Sutherland, and enjoyed the Peerage without Title, and by Usurpation—That the ancient Dignity was descendible only to Heirs Male—That upon the Death of John, the Brother of Elizabeth, there was an Heir Male intitled to the Honour, who neglected to claim it, and whose Right to the ancient Dignity is now devolved upon him, as the nearest Heir Male of the old Earls of Sutherland.—This Claim is founded upon a Supposition that the Possession of the Dignity from the Death of John, the Brother of Elizabeth, down to the present Time, has been *tortious*. But as it is not pretended that any Claim to this Dignity, or Challenge of the several Possessors Right, was, during this long Period, ever made by any Person as Heir Male, it is impossible, that, after so long an uninterrupted Possession on the one Hand, and an uniform Acquiescence on the other, any Weight of Evidence can overturn the Conclusion thence arising, that the Possession was legal: So that even were Mr. Sutherland able to prove himself the Heir Male of the ancient Earls, he can never overcome the legal Presumption barring his Claim; nor even put it upon the Claimant, contending for the Male Descent of the Honour, to prove the Extinction of the ancient one.—By the Law of Scotland, Titles of Honour were extinguishable, not only by Failure of Heirs or Forfeiture, but frequently passed from one Line of Descent, and even from one Family, to another, by new Grants of the Crown, proceeding upon the Resignation of the actual Possessor, or Consent of the Heir intitled to take next*.—And after great Length of Time, and from the Chasms in the Records occasioned by various Accidents, it would be impossible to discover the Vouchers of such Acts.—If, therefore, after a Lapse of 250 Years, a Claim grounded upon a Title paramount, and contradictory to that Possession, should be endured, the Confusion in the Descent and Succession of Peerages would be inextricable and endless.—Hence it is humbly submitted, that the Dignity in Dispute must now belong to the Heir of the Family which has last possessed it for so many Generations; and consequently either to Sir Robert Gordon, as Heir Male, or to Lady Elizabeth, as Heir General of that Family.

The material Questions therefore, are, on the one Hand, Whether Adam Gordon, the Husband of Elizabeth, was actually created Earl of Sutherland; and whether that new Dignity was descendible to Heirs Male, or Heirs General?—On the other, Whether Elizabeth inherited the ancient Peerage by Descent as Heir General, and has transmitted it to her Posterity?

The Petitioner, Sir Robert Gordon, submits the following Propositions.

1st, That the ancient Peerage was not descendible to Heirs General, and did not devolve upon Elizabeth, Sister to John, the last Earl of the Name of Sutherland. But,

2dly, That Adam Gordon, the Husband of Elizabeth, was created Earl of Sutherland.

3dly, That, admitting Evidence of actual sitting in Parliament to be absolutely necessary for proving the Existence and Enjoyment of this Peerage, where there is neither Patent nor Instrument of Creation appearing, the Non-appearance in the Parliament Rolls of such Sitting must equally affect the Claims of each of these two Petitioners, absolutely destroy Mr. Sutherland's, and oblige Sir Robert Gordon and Lady Elizabeth to claim the

† The Proceedings in the Precedency Process are printed at the joint Expence of Lady Elizabeth and Sir Robert Gordon.

* As appears from the Case of the Peerage of STAIR, determined by your Lordships in 1748.

Peerage, the one as Heir Male, the other as Heir of Line, of Earl John, the first Earl appearing in the Records of Parliament in 1543.

4thly, That in either Case, whether Adam Gordon or his Grandson John was the first Person ennobled, the legal Presumption is, that the Honour was descendible, in the first place, to Heirs Male.

Upon the first Point, it is an established Maxim in the Law of Scotland, that ancient Peerages are presumed descendible only to the Heirs Male of the Person first ennobled, where there is no Patent or Act of Creation directing a different Course of Descent.—The Petitioner will not trouble your Lordships with farther Argument upon this Head, than by referring to a late Judgment of the Court of Session in 1729, upon the Peerage of Lovat, confirmed by his Trial as a Peer at your Lordships Bar; and to a more recent one of your own in 1762, upon the Earldom of Cassillis; and a still later one in the Case of Lord Borthwick*; all of which were, like the present, ancient Peerages without Patent or special Limitation of Descent; and all adjudged descendible to Heirs Male, in Preference to Heirs General.—Hence it is become an established Maxim, that where no Patent of Creation exists, the Honour is presumed descendible in the Male Line only; and that special Evidence is required to support the Right of General Inheritance to such an Honour.—Male Inheritance to Peerage is presumed, till the contrary is proved. General Inheritance is never presumed; and must therefore be proved.

The ancient Modes of Creation were ill suited to Women, who could not perform the Service in Parliament required by the Creation of Peerages.—In old Times every legal Idea was adverse to the Creation of Female Dignities.—The first Lady ennobled in Scotland was a Lady Baroness Crammond, in the Reign of King Charles the First; and the first Countess created there was the Countess of Dysart, in the Reign of Charles the Second. Hence it follows, that the Petitioner Lady Elizabeth must prove, by clear and precise Evidence, that the ancient Peerage of Sutherland was descendible in a general Course of Inheritance, and not singly to Heirs Male; and that upon the Death of John the Brother of Elizabeth, it descended upon Elizabeth, as Heir General.

In Support of the general Inheritance to this Honour, in the Question of Precedency above-mentioned, the general Limitations of the Lands and Estate of Sutherland to Heirs simply, were strongly urged, and that in fact Elizabeth was served Heir to her Brother John, and inherited the Family Lands and Estate; which Argument will probably be renewed by the Petitioner Lady Elizabeth.—But, at most, it is only a presumptive one.

In the Case of territorial Dignities, indeed, the Lands and Dignity necessarily moved in the same Line of Descent: But if any such ever existed in Scotland, it was certainly at a very remote Period.—They must have been introduced with the Feudal Law, been held in capite by military Tenure, been masculine Fiefs unalienable without the Sovereign's Consent, and descendible only to Heirs Male, agreeable to the Principles of that Law.—But when the Rigor of the Feudal System came to abate, so as to render Lands liable, not only to Alienation without Consent, but even to Attachment for Debts, all former Union between them and Dignities, if such there ever was, must necessarily extinguish, and these last become merely personal, being neither alienable without Consent, nor attachable by Creditors.—Now, that Lands in Scotland were saleable for Payment of Debts, is traced up as high as 1214; by which Time, therefore, territorial Dignities must have been in Disuse; and the first Proof extant of the Existence of an Earl of Sutherland is subsequent to that Period, nor can the least Evidence be adduced of that Earldom's ever being a territorial Dignity.

2. No Argument can arise towards establishing an Union of the Dignity with the Property of the Lands, from the Form of Words used in Charters of Investiture, Resignation, &c.—By the ancient Mode of creating Peers in Scotland, the Persons ennobled were not only invested with the Dignity in certain usual Forms, but their Lands often erected into Earldoms and Baronies; which Terms became thenceforth Part of the Description of the Lands themselves, and continue such to this Day.—It is, however, a settled Point, that by such Description in Grants the Lands only pass, but not the Peerage, unless specially granted or resigned.—Nay, in the Peerage of Cassillis, the Royal Charter, granting "*Comitatum et Dominium de Cassillis cum titulo, dignitate, pre-cedentia et prioritatem* (express Words of Grant) *dicto Comiti et predecessores per leges ac praxin hujus regni nostri* "debit." was by your Lordships adjudged not to pass the Title and Dignity, because they had not been specially resigned.

3. Lands always go, in the Course of legal Descent, to the Heir of the Person last seised thereof.—An Heir taking by Descent must be served Heir in Special to the Person last seised; thereby becoming the Representative of that Person, without Connection with any preceding Owner. But Dignities require no Service for transmitting them; they pass by the single Cast of the Law, and every Successor to the Dignity takes as Heir to the Person first ennobled, and as descended of him, not as connected with the last Successor.

4. The ancient Charters produced by the Earl of Sutherland in the above Question of Precedency, and which, it is imagined, will be relied upon by the Petitioner Lady Elizabeth, are,

1st, A Charter of King David the Second, to William Earl of Sutherland and Margaret his Spouse, the King's Sister, erecting the Estate into a Regality. "*Quod ipsi et heredes inter ipsos legitime procreandi habeant, teneant et possideant de nobis et heredibus nostris totum Comitatum Sutherlandie in adeo liberam Regalitem in perpetuum cum omnibus et singulis libertatibus, &c. quae ad liberam Regalitem spectare noscuntur, &c.*"

2dly, A Charter to John Sutherland, upon the Resignation of his Father Earl John, granting to his Son, "*Totum et integrum Comitatum de Sutherland cum pertinentiis jacentem infra Vicecomitatum de Inverness, &c. Tenend. et habend. totum et integrum predictum Comitatum cum pertinentiis, dicto Joanni Sutherland filio et heredibus suis de nobis, heredibus et successoribus nostris, per omnes rectas metas suas antiquas, &c. Faciendo inde annuatim dictus Joannes filius et heredes sui, nobis heredibus et successoribus nostris servitia de dictis terris debita et consueta*"; and which are explained in the Charter to be the Services of a Ward-holding. And Earl John reserves to himself the Life-rent "*Totius dicti Comitatus.*"

3dly—Charter, granting to Alexander Master of Sutherland, the Son of Adam and Elizabeth—"*Totum et integrum predictum Comitatum de Sutherland; ac omnes et singulas terras ejusdem, dicto Alexandri Gordon et heredibus,*"

* The Claimant, now Lord Borthwick, stated, in his printed Case given in to your Lordships, That "*John, the ninth Lord Borthwick, who died in 1672 without Issue, was succeeded in his Estate by John Dundas of Harviestown, who was served nearest Heir of Line to the said John Lord Borthwick, his Uncle, upon the 26th January 1681.*"—That "*there is no Patent of Honour, or Evidence of the Creation of this Dignity, now existing; and as it is now established, that ancient Peerages descend to the Heirs Male of the Person first ennobled, where no Limitation of Heirs appears, so this Dignity, upon the Failure of Issue Male of John the ninth Lord Borthwick, devolved on the Heir Male descended of Alexander Borthwick, second Son of William third Lord Borthwick*" (who sat in Parliament 1467).

And on the Claimant's proving his Descent from this Alexander, your Lordships adjudged the Peerage to him, without any Inquiry into the Rights of Mr. Dundas, the Heir General.

tenen. &c. de nobis et successoribus nostris in feodo et hæreditate, ac libero Comitatu in perpetuum per omnes relictas metas suas antiquas et divisas—1 Dec. 1527—Upon Elizabeth's Resignation.

1546.

4thly, Charter of Queen Mary's in 1546, to John Earl of Sutherland, (proceeding upon his own Resignation) and Elizabeth Campbell Countess of Murray his Wife: Tenend. & habend. omnes & singulas prænominate terras comitatus de Sutherland, cum turre et fortalicio de Dunrobin, &c. præfat. Joanni Comiti de Sutherland, et Domine Elizabethæ Campbell sponsæ suæ, ac eorum alteri diutius viventi in conjuncta infeodatione et hæredibus inter ipsos legitime procreatis seu procreandis quibus deficien. legitimis et propinioribus hæredibus dicti Comitis quibuscunque, seu assignatis.

It is also imagined she will rely on the following Charter, viz.

B. 4. No. 202.

1st—Charter to John Earl of Sutherland, and Margaret his Wife, &c.—Tenen. et habent. dicti Joanni et Margaretæ et eorum alteri diutius viventi et hæredibus inter ipsos legitime procreatis seu procreandis; quibus forte deficientibus veris legitimis et propinioribus hæredibus dicti Joannis quibuscunque—29 April 1451.

— 22. No. 76.

2dly—Charter to the above Alexander, Earl Adam's Son, of the Lands of Navidale, tenen. et habent. dicto Alexandro et Janetæ ejus sponsæ, et eorum alteri diutius viventi in conjuncta infeodatione, et hæredibus inter ipsos procreatis seu procreandis, quibus deficien. legitimis propinioribus hæredibus dicti Alexandri quibuscunque—4 March 1527.

After the Death of that Earl John who obtained the Charter of 1455, his Estate vested in his Son Earl John the weak Man, by special Service and Infeftment; and upon his Death, it vested in his Sister Elizabeth by the same Means. Had an Heir Male appeared, and contested her Right of being served special Heir in the Estate to her Brother, it is at least a Doubt, whether the Grant in the Charter of 1455, to her Father, et hæredibus suis, would have been construed a Grant to Heirs General, so as to intitle her to the Service: But none disputing her Right, and her Brother having judicially declared that his Sister Elizabeth should succeed him in his Estate, (which was probably understood as equal to a Settlement thereof) her Service proceeded without Opposition; and had the Jury, who would be all of her own naming, inclined to inquire into her Right under the antient Investitures of the Estate, they would have no Opportunity to do it, because Earl John the Brother having been infeft upon his special Service, that Infeftment only was necessary to be produced to the Jury. Elizabeth's taking by Service under such Circumstances, cannot therefore be considered as an Explanation of the legal Import of the Words hæredibus suis in the Charter of 1455, unless some more antient Investiture be produced, giving the Estate to Heirs General, by the known Description of Heirs whatsoever.—Heirs simply may bear different Constructions, secundum subjectam materiam.—When used in Deeds relative to Lands descendible by the Investitures to Heirs General, Heirs General will be understood.—When in Deeds relative to Lands descendible to Heirs Male, Heirs Male can only be understood.—When used in an Investiture, the Heirs of the preceding Investitures will be understood: And these, in all ancient Grants of Lands, must be presumed to mean Heirs Male, till the contrary appears; because such was the Rule of the Feudal Law, which anciently directed the Descent, and still regulates the Transmission of Lands in Scotland.

The Charter of 1347, is but an Erection of the Lands into a Regality, and the Words hæredes inter ipsos, in those Days did not necessarily imply Heirs General of the Marriage:—At any rate, they apply only to the Jurisdiction of Regality, which the King chose to limit to the Issue of his Sister by her Husband William Earl of Sutherland; and whatever might be the Effect of these Charters, in trying the Right to the Estate between an Heir Male and Heir Female, they can have no Weight in determining the Descent of the Peerage; not only from the Judgments and Reasons already mentioned, but because the Researches made in former Questions of this Sort evidently shew that Peerages, whose Creation does not appear, descended to Heirs Male, in Exclusion of Heirs General, as well where the Family Lands stood limited hæredibus suis, or even hæredibus quibuscunque, as where they stood limited to Heirs Male before and after the Time of the Creation. (Appendix, No. V.)

But were Investitures of the Estate of any Weight in regulating the Descent of the Peerage, it will appear that others of them operate more strongly against the Female Descent, than those produced by Lady Elizabeth do for it. (Appendix, No. III.)

Great Seal Records, Book 1. No. 157.
—Book 35. No. 630.

The Charter of King David the II, to William Earl of Sutherland, Anno 1366, of the Half of the Thanesdom of Formartine, (a very large Estate) is limited to Heirs Male expressly.

The Charter of Confirmation, 23d November 1581, of the Grant of the Fee-farm of the Lands of Gauld-wel, &c. is limited in the first Place to Alexander Earl of Sutherland, and the Heirs Male of his Body.

—No. 73.

The Charter of Resignation of the Lands and Barony of Far, (5th July 1683) is "Alexandro Comiti de Sutherland, suis hæredibus et assignatis," "Reddendo dict. Comes, hæredes sui masculi et assignati."

—Book 37. No. 304.

By Charter from George Lord Gordon in 1559, John Earl of Sutherland, and his Heirs Male, were constituted Sheriffs Depute of the County of Inverness, over the Bounds of the Earldom of Sutherland. In 1590, George Earl of Huntley granted to Alexander Earl of Sutherland the Office of Sheriff of that District; and the Charter of Confirmation (19th June 1590) is in these Words: "Alexandro Sutherlandiæ Comiti, hæredibus suis et successoribus, Sutherlandiæ comitibus, de officio vicecomitis vicecomitatus de Inverness, infra totam et integram patriam Sutherlandiæ: Reddendo dict. Comes Sutherlandiæ, sui que hæredes et successores."

The Charter of Novodamus, 29 April 1601, upon the Resignation of John Earl of Sutherland (then having Issue a Son and a Daughter) is, "Totius et integri comitatus de Sutherland, ac omnium et singularum terrarum ejusdem," and granting a Regality (not mentioned in any preceding Charter after King David the Second's Charter 10 Oct. 1347) &c. to the said John Earl of Sutherland, and the Heirs Male of his Body; failing whom, to his Brother Robert, and the Heirs Male of his Body; failing whom, to his Brother Alexander, and the Heirs Male of his Body; failing all which, to Adam Gordon, Son to George Marquis of Huntly, and his Heirs Male whatsoever.—This Charter, which proceeds upon a Royal Signature, affords the strongest presumptive Evidence that can arise from the Limitation of an Estate, of the Honours going only to Heirs Male; for however Parental Affection might induce a Separation of the Lands of the Earldom from the Dignity in favour of Daughters incapable of inheriting that Dignity, it can never be imagined that any Peer would be so regardless of his Peerage, and the Interest of his Daughters, as to convey from them the Lands of the Earldom, if the Dignity itself was descendible to them.

—Book 52. No. 134.

The Charter of Erection of Dornoch into a free Royal Borough (14th July 1628) contains a Reservation to John Earl of Sutherland, his Heirs Male and Successors of the Lands of Dornoch.

B. 53. No. 154.

The Charter of the Regality and Sheriffdom of Sutherland—dicto nostro consanguineo Joanni Sutherlandiæ Comiti, hæredibus masculis et assignatis quibuscunque.—14th Sep. 1631.

That

That of 21 February 1662 (upon the Resignation of Earl John) "*Comitatus de Sutherland et singularum terrarum dicti comitatus*," is limited to George Lord Strathnaver, eldest Son of John Earl of Sutherland, and his Heirs Male using the Name of Gordon, and Arms of the Family of Sutherland.

That of 24 July 1681 (upon the Resignation of Earl George) "*Totius et integri Comitatus de Sutherland et omnium et singularum terrarum ejusdem*," is limited, to John Lord Strathnaver, only Son of George Earl of Sutherland, and the Heirs Male of his Body; whom failing, to George Earl of Sutherland, and Heirs Male of his Body; whom failing, to the eldest Heir Female of the Body of John Lord Strathnaver and Lady Helen Cochrane his Wife; and the Heirs Male of the Body of such Heir Female.

In both these Charters the Issue Female of the eldest Son, instead of taking immediately upon Failure of his Issue Male, are postponed to all the Heirs Male of the Body of the Father: And it cannot be imagined, that younger Heirs Male should be preferred to the Issue Female of the eldest Son, had the Honour been thought descendible to the latter.

Charter of the Earldom of Sutherland, &c. Willielmo Domino Strathnaver, filio, &c. Georgii Comitatus de Sutherland, et hæredibus masculis legitime procreandis inter illum ut Magistrum C. Morison sponsam suam; whom failing, to Lord Strathnaver's Heir Male by any other Marriage; whom failing, to John Earl of Sutherland the Father, and the Heirs Male of his Body, &c.—29th March 1706. (Appendix II. No. 3.)

From these Instruments it appears, that the Charters of Investiture, Resignation, Novodamus, &c. instead of supporting the Idea of General Descent of this Peerage, really afford strong presumptive Evidence to the contrary.

The Petitioner admits that *Elizabeth* is often described as Countess of Sutherland; but this Circumstance is equally applicable to his Proposition, that *Adam Gordon* her Husband was created Earl of Sutherland, as to the contrary one of her taking the Title by Descent—The other, of Earl John and Earl Alexander, the Grandson and Great Grandson of *Adam* and *Elizabeth*, being served Heirs to *Elizabeth*, proves nothing as to the Honour—Such general Services are intended only for establishing a Title to some heritable Right, a Bond, or the like, not completed by Infeftment. And in the same Manner, and most likely for the same Purpose, was Earl Alexander served Heir to his Great Grandfather *Adam* Earl of Sutherland.

The only remaining Circumstance known to the Petitioner Sir Robert Gordon, whence can arise any Inference in favour of *Elizabeth*'s having taken the Title of Countess of Sutherland by Descent, is the Charter, 1 Dec. 1527, of Resignation of the Earldom (i. e. the Lands of the Earldom) in favour of Alexander, Adam Gordon's and her Son.—It is made by *Elizabeth*, with Consent of *Adam*, to hold as free as *Elizabeth* or any of her Predecessors Earls of Sutherland had held it. "*Reservato tamen libero tenemento totius dicti comitatus et omnium terrarum ejusdem cum annexis, dependen. tenentibus, tenendriis*," &c. "*dicto Elizabeth comitisse de Sutherland et Ade Gordon sponse sue ratione curialitatis Scotie et ipsorum alteri diutius viven. pro toto tempore vite sue*." This relates only to the Lands whereof she was seized in her own Right by her Service of Heir to her Brother; and whereto her Husband could have no Title but as Tenant by the Courtesy after her Death; and the single Inference it affords arises from the Clause of Reservation—To *Elizabeth* Countess of Sutherland and *Adam Gordon* her Spouse.

But no Conclusion can be drawn from these Words—*Adam* unquestionably enjoyed the Title of Earl of Sutherland from 1515 till his Death—The Title of Countess therefore was due to *Elizabeth* as his Wife: And as to the Description of her Husband, however in the Clause of Reservation he is named simply *Adam Gordon*, yet in the Beginning of the Charter he is described by the Title of *Adam Earl of Sutherland*, the Grant being "*Alexandro Gordon filio et hæredi apparenti consanguinei nostri Ade Comitatus de Sutherland et Elizabeth Sutherland Comitisse de Sutherland sponse sue*."—This clearly proves the Inaccuracy of his Description in the Clause of Reservation. A similar Argument was urged in the Question of Precedency to the direct contrary Purpose, viz. to prove that *Elizabeth* was not Countess in her own Right; for that in the Service to her Brother she is named only *Elizabeth Sutherland*; whereas had the Honour descended upon her as Heir General, she became Countess at the very Instant of her Brother's Death.—But the Earl of Sutherland answered, that no Argument could arise from this Expression in the Service; and as a Proof of the Inaccuracy frequent in this respect, this very Charter was mentioned as describing the same Person in one Clause by a Title of Dignity in another simply by his Name.—It deserves therefore no Attention in the present Dispute; and as no Instrument has ever been produced, denoting the Dignity to have vested in *Elizabeth* in her own Right, and this very Point has already received a solemn Determination in an adversary Suit, maintained with great Eagerness, wherein all the Evidence in the Family's Power for proving the Descent to *Elizabeth* was produced to the Court, Sir Robert Gordon must believe, that none more satisfactory can now be laid before your Lordships; and therefore humbly flatters himself, that your Lordships Judgment with regard to the supposed Descent of this Honour upon *Elizabeth*, will concur with that of the Court of Session*.

On Lady *Elizabeth*'s Part it will probably be objected,—That at Earl John's Death without Issue, the Heirs Male of the ancient Earl of Sutherland were not extinct,—and admitting therefore the Presumption in favour of Male Inheritance, it is impossible the Earldom of Sutherland could have been conferred by Creation upon *Adam Gordon*, that Honour still subsisting in the Heirs of the ancient Earls either Male or General; and as it undoubtedly vested either in *Adam* or *Elizabeth*, if it could not be created in *Adam*, it must necessarily have come to *Elizabeth* by Descent.

This Objection proceeding upon the same Ground as Mr. Sutherland's, is in a great Measure answered by the Observations upon his Claim; and it being now above 250 Years since the Male Line of the ancient Earls ceased to enjoy the Honour, it is impossible to account with Precision, how or by what Accident their Right of inheriting at that very remote Period, was prevented or extinguished.—Resignations of Peerages, in order to transmit them to a new Series of Heirs, different from those on whom they would otherwise have descended, were frequent in Scotland; and it is highly probable that Earl John actually resigned the Honour in Favour of his Brother-in-law *Adam Gordon*, to whom he had given up the Management of his Estate, it being evident, from the other Family Transactions of the Time, that Earl John was entirely under the Power and Influence of his Brother-in-law, who, having obtained from him a Declaration of his Sister *Elizabeth*'s Succession to his

* There are private Deeds between the Families of Sutherland and Duffus, wherein *Elizabeth* is described *Domina de Sutherland* (i. e. *Lady of the Land*) and *Adam* called at the same Time Earl of Sutherland.—Particularly, Precept of Sasine, 13th July 1525, of the Lands of Skelbo. Instrument of Sasine, 11th August 1525, of ditto.

Estate, upon his dying without Issue, might well compleat his View of an universal Heirship to him, by obtaining a Relinquishment of the Honour in his Favour, as was then daily practised.

Point 2d.
Creation of Earl
Adam.

That *Adam Gordon*, the Husband of *Elizabeth*, really enjoyed the Title, Rank and Privileges of Earl of *Sutherland*, is undisputed between the Claimants; and ascertained by such a Variety of authentic Evidence, as puts it out of all Possibility of Doubt. The Council Records prove his sitting at that Board as Earl of *Sutherland*; and other publick Records of the Time prove his being universally allowed and acknowledged as such. He is so described in a Variety of private Deeds; and in the Service of his Great-grandson, Earl *Alexander*, in 1590, as Heir to him, he is expressly called by the Name and Title of *Adam, Earl of Sutherland*. There is, indeed, no Evidence in the Parliament Rolls of his sitting there: But that will not warrant a Conclusion of his having never sat in Parliament, the Parliament Rolls from 1505 to 1524 being lost; and the same Right which intitled him to sit in Council as Earl of *Sutherland*, would equally intitle him to sit in Parliament as such. But it is highly probable, that in the Years 1515, 1516, and 1517, during which he appears to have been at Court, and have sat at the Council Board, he did not omit exercising his Right of sitting in Parliament. His Age, and the Distance of his Residence from the Seat of Government, sufficiently account for his not sitting in Council or Parliament after 1525. Indeed the Attendance of the great Lords in Parliament was not very frequent in those Days; they esteeming it a Diminution of their Dignity and Consequence to mix with the lesser Barons, who all sat then in Parliament. The few greater Barons that attended were chiefly such as lived in the Neighbourhood, or by their Offices were obliged to that Attendance.—The Proofs of Earl *Adam's* enjoying this Peerage are stronger than all the Evidence that can be brought of its Enjoyment by the preceding Earls, of whose sitting in Parliament no Mention is made in the Records.—If, therefore, the Evidence as to them is sufficient, Earl *Adam's* must at least be equally so as to him.—No. 2. Appendix.)

The only Point then in Dispute is, in what Right he held the Peerage, whether in his own by Creation, or in his Wife *Elizabeth's* by the Courtesy of Scotland?—Now the Right by Courtesy depending upon *Elizabeth's* inheritable Right to the Honour, and this last being establishable, not by Presumption, but by direct Proof only, if the Petitioner Lady *Elizabeth* fails in such direct Proof, the Title by Courtesy must necessarily fall to the Ground; whereas, on the Petitioner Sir *Robert Gordon's* Part, it is sufficient to shew an actual Enjoyment of the Honour by *Adam*; whence arises the legal Presumption, that he held it in his own, and not in another's Right.

In a Question of this Sort, your Lordships will give full Weight to every Circumstance of legal Presumption, where not encountered by clear Evidence: And here various Circumstances coincide (uncontradicted by Proof) in Support of the legal Presumption, that *Adam* actually held this Honour in his own Right by Creation.

Vide Historia
Monast. de Kin-
los apud Martine
Collect. Vet.
Script. Paris
1729, tom. vi.
p. 326. Cet.—
Nicolson's Scots
Hist. Library.

Ferrarius is in
the Advocate's
Library at Edin-
burgh, and
another Copy
among the MSS.
of the Harleian
Collection in the
Museum, ac-
cording to print-
ed Catalogue
1759, No. 1423.

1st. History.—Lord *Stair*, Inst. 2, tells us, that “Histories are probative in all Cases where Fame is relevant, if they be authentic, and not contradicted by more authentic Histories of the same Time, as in the Case of Propinquity of Blood, or of Antiquity, and Priority of Dignity, Titles of Honour,” &c. *Joannes Ferrarius* was a contemporary Historian, well versed in the Scots History: He wrote the Continuation of *Hector Boece's* History of Scotland, the History of the Abbots of Kinloss, and that of the Gordon Family. He lived (three Years) at the Court of Scotland with *Reid* Bishop of Orkney, a Minister of State, the very Time when *Adam Gordon* was acknowledged Earl of *Sutherland* by Charters under the Great Seal: And in the History of *George* Earl of *Huntly*, Father to Earl *Adam*, his Words are these: “*Adamum secund. genitum Dominum de Aboyne instituit, cui postea per nuptias Elizabetham Sutherlandie heredem junxit matrimonio, qua de re Comes Sutherlandie deinceps CREATUR.*”

2^{dly}. The Name and Arms borne by the Family ever since the Time of *Adam Gordon* afford material Observation. From the earliest Period, whence the ancient Peerage of *Sutherland* can be traced down to the Time of *Adam Gordon*, the Name and Arms of *Sutherland* were constantly borne by all the Earls of *Sutherland* and their Families; and it seems next to Certainty, that had that ancient Honour continued, the subsequent Earls would have gone on bearing the same Name and Arms. But from *Adam Gordon's* Time, down to that of the Question of Precedency, it is an undisputed Fact that the Name and Arms of *Gordon* were borne by all these Earls of *Sutherland* and their Families. Upon that Occasion indeed, as already mentioned, it was thought proper to lay aside the Name and Arms of *Gordon*, and reassume those of *Sutherland*, for farthering the Claim to the old Peerage in Opposition to the more recent one in *Adam Gordon*. But this shews the Idea of the Family itself, that the bearing the Name and Arms afforded a material Presumption in Favour of a new original Creation in *Adam Gordon*.*

3^{dly}. Another material Circumstance to assist that Presumption, is the Barony of *Lord Gordon of Dornoch*. In the King's Ratification in 1617, of the Commissioners Decree of ranking 1606, the then Earl of *Sutherland* is described by the Titles of Earl of *Sutherland*, and Lord *Gordon of Dornoch*, of which last there is no Trace of Existence before the Time of *Adam Gordon*—(N. B. This Ratification was produced in the Question of Precedency, and taken back by the Earl of *Sutherland's* Agents, and is now in the Petitioner Lady *Elizabeth's* Custody.) It bears strong internal Evidence of Creation, either in the Person of *Adam Gordon*, or some of the succeeding Earls of *Sutherland*, for besides the Family Name of *Gordon*, the Addition of *Dornoch*, Part of the ancient Earl of *Sutherland's* Estate, proves the Creation to have been after the Junction of the two Families, by *Adam Gordon's* Marriage with the Heiress of *Sutherland*, and renders it highly probable that this Title of *Lord Gordon of Dornoch*, was conferred upon *Adam Gordon* at the same Time with that of Earl of *Sutherland*, it being absurd to imagine that either he or his Successors, when already possessed of an higher Title, would take a lower in the same Line of Descent.

If *Adam Gordon's* Courtesy-Title falls to the Ground for Want of Proof of the Female Descent, it may be unnecessary to discuss, whether by the Law of Scotland, a Commoner's Marriage with a Peeress, followed by the Birth of Issue, conferred upon him the Peerage during his Life by Courtesy. There are indeed, many Instances of Titles of Honour enjoyed by the Husbands of Peeresses, but they by no Means decide whether the Husband's Right was by Courtesy or Creation; whereas the contrary Instances afford a very strong Conclusion, for if Peerage was acquirable by Marriage, it must have been universally so, as the Right thereto coming by Operation

+ Report of the Court of Session to your Lordships in 1739, and Certificats from the proper Officer.

* Precedency Papers, page 72—Two Certificats from the Lion or Herald's Office, 21 Feb. 1769.—and Sir Geo. Mackenzie's Heraldry.

of Law, which, *ipso facto*, fixed the Dignity on the Husband, it could not rest in his Option whether he would take the Peerage or continue a Commoner. Now there were various Instances not only of Commoners remaining such after their Marriage with Peereffes, but of their being actually created Peers after such Marriage, either by the same or a different Title of Honour.

Mr. *Falconar*, after his Marriage with the Countess of *Errol*, remained a Commoner; so did Sir *Alexander Anstruther*, after his Marriage with Lady *Newark*—Sir *William Scott*, after his Marriage with Lady *Napier*; and in later Times, Col. *William Dalrymple*, after his Marriage with the Countess of *Dumfries*.

Walter Scott marrying the Countess of *Buccleugh*, was created Earl of *Tarras* for Life.

Sir *James Wemyss* marrying the Countess of *Wemyss*, was created Lord *Burntisland*, but not Earl of *Wemyss*.

The Earl of *Selkirk* marrying the Duchess of *Hamilton*, was created Duke of *Hamilton* for Life. A very remarkable Instance this: For had he upon his Marriage, *ipso facto*, become Duke of *Hamilton* for Life, he needed not, nor would have desired a Grant of that Honour from the Crown.

These, and various other Instances, totally destroy the Notion of Courtesy, whereof we have no Idea at this Day, which we must have had if it ever was the Law of *Scotland*, because we find no Repeal of it by any subsequent Law, nor the least Mention thereof by any of the numerous Writers on that Law, whom it could not have escaped if at all consonant to their Notions of Rights acquirable by Marriage: But the present Case is totally different, it being clear that *Adam Gordon* actually enjoyed the Honour, and exercised the Rights of Earl of *Sutherland* during the Life of his Wife *Elizabeth*, which is utterly inconsistent with the Notion of a Tenant by Courtesy; for Sir *John Skene*, and other Writers on the Law of *Scotland*, say, that Courtesy takes Place only upon the Death of the Wife,—and even then it would be absurd to suppose, that the Husband could be an Earl in his Wife's Right, to the Exclusion of her Son, and still more so, that both Husband and Son could enjoy the same Dignity at one and the same Time.

From the Observations offered under the Second Point, it is hoped, that the Want of Evidence of Earl *Adam's* actual sitting in Parliament affords no Objection to the deriving a Title under him, as it equally affects the Right of the old Earls, who are not proved to have ever sat there. But if the Objection be of Weight, its Effect is only to reduce the contending Parties to claim the Peerage, not from *Adam*, but from his Grandson Earl *John*, the first Earl of *Sutherland*, whose sitting in Parliament is vouched by the Rolls: And it is quite immaterial to the Petitioner Sir *Robert Gordon*, whether Earl *Adam* or Earl *John* is to be considered as the first Grantee of the Honour in question.

In either Case he submits, that the legal Presumption, decisively established by your Lordships in the late Cases of the Earl of *Cassilis* and Lord *Borthwick*, is, that this Honour is descendible only to the Heirs Male of the Body of the first Grantee; consequently, that upon the last Earl's Death without Male Issue, it descended upon the Petitioner Sir *Robert Gordon*, as Heir Male of the Body both of Earl *Adam* and Earl *John*. Nothing can overcome this Presumption but clear and direct Evidence on the Part of the Heir General Lady *Elizabeth*.

Upon the Whole, he humbly submits, That the Petitioner Mr. *Sutherland* is absolutely barred from impeaching the Right under which this Honour has been uninterruptedly enjoyed above 250 Years.—That the Evidence of *Adam Gordon's* being created Earl of *Sutherland* is legal and satisfactory; and the Honour, therefore, must now descend either upon this Petitioner, as his Heir Male, or upon the other Petitioner, Lady *Elizabeth*, as his Heir General.—That where no Patent or Instrument of Creation appears, the established Presumption of Law is in Favour of the Heir Male, not repellable but by precise and conclusive contrary Evidence. Finally, that if none such is adduced, as he firmly believes there will and cannot, the Title and Dignity of Earl of *Sutherland* must be adjudged to him Sir *Robert Gordon*, as Heir Male of *Adam Gordon*, who was created Earl of *Sunderland*, and of his Grandson Earl *John*, the first Earl of *Sutherland* appearing from the Rolls extant to have sat in Parliament.

JA. MONTGOMERY.
AL. FORRESTER.
THO. LOCKHART.

A P P E N D I X N^o I.The PEDIGREE of the Claimant Sir ROBERT GORDON,
Baronet, from ADAM first Earl of SUTHERLAND of the
Name of GORDON; and References to the Proofs.

ADAM GORDON, second Son of George second Earl of Huntly, by a Daughter of James I. King of Scotland, created Earl of SUTHERLAND by King James V. Proved by Royal Charters, Acts of Council, private Deeds, Histories of Peerages, &c. He married Elizabeth, Daughter of John Earl of Sutherland — He died in the Beginning of the Year 1538. — Vide No. 2.

ALEXANDER Master of Sutherland, eldest son of Earl Adam. Proved by Royal Charters, Anno 1527, &c. He died before his Father, leaving his eldest Son,

JOHN Earl of Sutherland. — He is the first of the Family marked in the Rolls of Parliament, viz. Anno 1543. He got a Charter of the Earldom under the Great Seal 1546; was forfeited 1563, restored, served Heir in General to his Grandmother Elizabeth; and dying in 1567, was succeeded by his Son

ALEXANDER Earl of Sutherland. Proved by Service as Heir to his Father John, 8 July 1573, and as Heir to Adam Earl of Sutherland, his Great-Grandfather, and as Heir to Elizabeth Countess of Sutherland, his Great-Grandmother in January 1590. — He died in December 1594.

JOHN Earl of Sutherland, eldest son of Earl Alexander. Proved by a Charter of the Earldom in 1580. — He obtained a Charter of the Earldom under the Great Seal, on his own Resignation, penult April 1601. — Died 13 September 1615.

JOHN Earl of Sutherland. — Proved by Retour as Heir to his Father John, 4 June 1616.

GEORGE Earl of Sutherland. — Proved by Charter under the Great Seal, 21 February 1662, and 24 July 1681. — He died 1703.

JOHN Earl of Sutherland. — Proved by Charter under the Great Seal, dated 29 July 1706, &c. — Died 1733.

WILLIAM Lord Strathnaver. — Proved by said Charter under the Great Seal, dated 29 July 1706. — Died before his Father, 1720.

WILLIAM Earl of Sutherland. — Proved by his Service to his Father, 7th January 1723. — Died 6 November 1750.

WILLIAM Earl of Sutherland. — Proved by his Service as Heir to his Father, 18 November 1751. — Died 16 June 1766, leaving an only Child.

The Claimant Lady ELIZABETH GORDON, an Infant.

Sir ROBERT GORDON of Gordonston, Baronet, Earl Alexander's second Son, created Premier Knight Baronet of Scotland. — Proved by Charter under the Great Seal, penult April 1601, mentioning him to be Brother German to John then Earl of Sutherland. Patent creating him Knight Baronet.

Sir LUDOVIC GORDON, eldest Son. — Proved by his Contract of Marriage, 18 November 1643. — Died in September 1685.

Sir ROBERT GORDON, eldest son. — Proved by Retour, 21 September 1688. — He died 1704.

The CLAIMANT Sir ROBERT GORDON, now of Gordonston, Baronet, eldest Son. — Proved by Retour, 12 July 1705.

A P P E N D I X. No. II.

CONTAINING,

EXCERPTS from the Records of Charters under the
Great Seal, Records of the *Council*, Books of the *Council*,
&c. for proving that *Adam Gordon* was *Earl of Sutherland*.

SEDERUNT legatus, &c. cancellarius & Epi. Dunkelden., Moravien., Candidæ casæ, Dumblanen. Lismoren. Comites de Huntlie, Araniæ Regentes; Crawford, Morton, Marischal, Erroll, Athole, Cassillis, Rothes, SUTHERLAND, Montrose, Prior Sancti Andreae, abbates sanctæ crucis calco Pasley, Prior candidæ casæ, Coldingham post. Dundrenan, Corfrakwell, Pluscardin, Domini Fleming, Maxwell, Zester, Crichton, Ross, Semple, Annandale, Lyle Sancti Joannis Clericus Registri, Decani Glasguen. Dunkelden. præpositus de Crichton, officialis *Ws. Scott de Baliwery*. M. Ja. Wishart—M. Adam Otterburn commissarii Burgorum, Joannes Hamilton de Eder, Joannes Mar. Aberden, D. D. Lermont Sancti Andreae.

Sederunt legatus, cancellarius, Comites de Huntlie, Araniæ candidæ casæ, Lismoren. *Ws. Comes de Sutherland*, Eglinton, Glencairn, Cassillis, Athole, Montrose, Rothes, prior Sancti Andreae—Ro. Abbas de Pasleto, Dundrenan. Corfragwell, Domini Fleming, Borthwick, Crichton, Ross, Ogilvie, Cathcart, Sancti Joannis Clericus, registri Decanus, Glasguen. præpositus de Crichton, Mag. Ja. Wishart—M. Ad. Otterburn Dus. de Baliwery, Patricius Hamilton, Patricius Crichton, Milites.

The *Earl of Sutherland* is mentioned in an Act of Council, proceeding on the Consent of the *Earl of Huntly*, that the *Earl of Caithness* should be relaxed from the Horn, and mentioning Lawborrows to have been raised by the *Earl of Caithness* against the *Earls of Huntly and Sutherland*; and the Lords Suspension thereof on *Earl Huntly's* taking it upon him, that the *Earl of Caithness*, and his Servants and Company shall safely come to the Council.

Anent the Summonds of Recent Spulzie, raised at the Instance of *Elizabeth* Countess of *Huntlie* and *William Gordon* of *Auchinden* her Servant, against *Alexander Gordon* Heir of *Strathowyn*, *John Gordon* of *Quisney*, and *Adam Earl of Sutherland*, for the Wrongous and recent Spoliation away taking and withholden be themselves, their Servands and Complices of their causing Command, Refett and Ratihabition fra the said *Elizabeth* as Principal and fra the said *William* her Servand furth of the Lands of *Dawane* pertaining to her in Conjunct Fee of 200 Bolls Aits, Price of the Boll 13s. 4d. 100 Bolls of Bear, Price of the Boll 20s. with Fedder-beds, Bolsters, and Infight Goods, as at mair Length is contained in the Summonds thereupon. The said *Elizabeth* and *William* compearand be Mr. *Robert Galbreath* their Proctor, and the Remanent of the said Persons lawfully summoned to this Action oft times callit and not comperit, the said Mr. *Robert* intented his Action and Claim against the said *John Gordon* of *Quisney* allenarly and the Lords decern against him only.

In Presence of the Lords of Council compeared *George Douglas* Master of *Angus*, in the Name and B.half of *Archibald* Earl of *Angus* Chancellor on that ane Part, and *Robert Berton* of *Over Barnton* on the other Part, and gave in this Band and Obligation subscrivit be the said *Robert*, and desirit the same to be put in the Books of Council in Form of Act; and the Lords to interpone their Authority and Decreet thereunto.—The which Desire the said Lords thought reasonable, and therefore ordains the said Obligation to be insert in the said Books, and to have the Strength and Effect of their Decreet in Time to come; and that our Sovereign Lord's Letters be direct to command and charge, compel and distrenzie the said *Robert* for the fulfilling of the samen in all Points thereof in Form as Effairs. Of the which the Tenor follows, I *Robert Berton* of *Over Barnton*, &c.

In Presence of the said Lords comperit *Margaret* Lady *Gordon* and *John Drummond* of *Innerpeffer*, and of their awin Consent, Band and obleist Yame, conjunctly and severally to relieve and keep skaithless the said *Adam Earl of Sutherland*, and the Remanent of the Persons foresaid of the Band and Obligation maid be thaim to *Robert Berton* of *Over Barnton*, of his Band and Obligation maide to an noble and myehty Lord *Archibald* Erle of *Angus* foresaid, and yat our Sovereane Lords Letters be direct to compel yame yrto in Form as Effairs—*James Gordon* for himself and the Remanent of the Persons foresaid askit instruments thereupon.

In Presence of the Lords of Council, comperit *Robert Berton*, of *Over Barnton*, and thair schew how he was bund and obleist, the 19th Day of *August* last bypast, for *George* Erle of *Huntlie*, the Time that he past last in the Northland to visit his Friends, and to do his other lawfull Erands, till ane nobile and mighty Lord, *Archibald* Earl of *Angus*, Lord *Douglas*, Chancellor of *Scotland*, that he suld deliver and restore again to him the said *George* Earl of *Huntlie*, and failing of him, the Heretor of the hail Earldom of *Huntlie* quhatsumever, in the Town of *Edinburgh*, betwixt and the 15 Day of *December* next thereafter following, under the Pain of ten thousand Merks usual Money of *Scotland*, as his Letters Obligators under his Subscription Manuale actit in the Buiks of Council, and in the Officialis Buiks of *Lothian*, at mair Length proports: And sen he has deliverit and restorit again the said Erle of *Huntlie* now presently to my Lord of *Angus*, Chancellor, desyring therefore his Obligation and Band foresaid to be dischargit and dissolvit; the quhi k Desire the Lords thocht reasonable; and therefore has dischargit, and, with Consent of my Lord of *Angus*, discharges the said *Robert Berton*, and all uthers his Soverties, of thair Bands and Obligations maid for delyvering again of the said *George* Erle of *Huntlie* to the said Erle of *Angus*, because he is deliverit, and the samyn fullfilit really and with Effect in all Points; and dissolvit and admittis the saids Obligations, togedder with all Acts and Decrees maid thereupon;

and

and ordains the samyn to be cancellit, destroyit and put furth of the Buiks of Council and Officialis Buiks; and in likewise discharges *Adam Erle of Sutherland, Margaret Lady Gordon, Alexander Gordon, John Gordon of Lungar, John Drummond of Innerpeffer, James Gordon of Colquhadraston, Walter Gordon, Alexander Gordon*, and uthers, of their Band and Soverties, for the Cause foresaid; and Letters to be direct thereupon.

Records of
Great Seal.
1 Dec. 1527.
N. The Year in
Scotland began
at 25 March till
the Year 1600.
Records of
Council, 4 Dec-
ember 1527.

Carta resignationis Alexandro Gordon filio et hæred. apparenti consanguinei nostri Adæ Comitissæ de Sutherland et Elizabeth Sutherland Comitissæ de Sutherland sponsæ suæ et hæredibus suis, Comitatus de Sutherland et omnium et singularum terrarum ejusdem Comitatus.—This proceeds on the Resignation of *Elizabeth*, with *Adam's* Consent.

Records of Great
Seal, 4 March
1527.

Carta resignationis Alexandro Gordon Magistro de Sutherland filio et apparenti hæredi consanguinei nostri Adæ Comitissæ de Sutherland et Janetæ Steuart ejus sponsæ et hæredibus suis subscriptis, viz. hæredibus inter ipsos procreatis vel procreandis quibus deficient. legitimis et propinquieribus hæredibus dicti Alexandri quibuscunque—[of a Part of the Lands of the Earldom].—This proceeds on *Alexander's* own Resignation.

Records of
Council, 27
February 1531.

Decreets and delivers that *Adam Earl of Sutherland* has done wrang, in the recent Spoliation of the Teind Sheaves of the Lands of *Wryur, Clochquhynnis, and Lochtown*, lying in the Parochine of *Ruthven*, fra Mr. *Thomas Hay*, Dane of *Dunbar*, and Parson of *Ruthven*, pertaining to him as an Part of the Patrimony of his said Parsonage, and he being in Possession thereof, and therefore fall desist and cease therfra in Tym to cum; and also fall restore and deliver, content and pay the saids Teind Sheaves, extending to 16 Bolls of Wheat, Price of the Boll, with the Fodder, xx s.; xxiiij Bolls of Aits, Price of the Boll, with the Fodder, viij s.; liij Bolls of Bear, Price of the Boll, with the Fodder, vj s.; and iiij Bolls of Ry, Price of the Boll, with the Fodder, vj s.; quhilks pertenet to the said Mr. *Thomas*, as an Part of the Patrimony of his said Parsonage, and was masterfully spulzied fra him be the said Erle, as was cleirlye preven before the said Lords; and the Spulzie being previt, the Avail and Quantity was referred to the said Mr. *Thomas Aitb*, quhilk made Faith as is above written: And thairfor ordainis Lettres be direct to command and charge, compell and distrenzie the said Erle, his Lands and Guids, hairfor in Form as effeirs; the said Mr. *Thomas* compearand be Mr. *Robert Galbreath*, his Procurator; and the said Erle lawfully summoned to this Action oftymes callit, and not comperit.

Records of Privy
Seal, B. 11.
fol. 68.

Ane Letter made to Sir *John Campbell of Caldour*, Knight, his Airs and Assignayes, ane or mae, of the Gift of the Maills, Firms, Profits and Dewties quhatsoever Lands, Annualrents, Mylns, Multures, Fishings in fresh Water and salt, with Tennants, Tennandries, Service of free Tennants, Advocation and Donation of Kirks, and Chaplainries thereof, and all their Pertinents now being, or fall happen to be, in our Soverane Lord's Hands, be Decease of umquhile *Alexander Gordon*, Master of *Sutherland*, *Adam Gordon Erle of Sutherland*, his Father, *Elizabeth Sutherland*, Countes Moder to the said *Alexander*, or be Deces of ony of them, be reafoun of Ward, Nonentrefs, or any other Manner of Way, of all Years and Terms bygone, and sicklike of all Years and Terms to come, ay and quhile the lachfull Entrie of the righteous Air or Airs thereto, being of lachfull Age, with the Relief thereof, when it fall happen; and the Marriage of *John Gordon*, Son and Air of the said umquhile *Alexander*; and failing of him be Decease unmarreit, the Marriage of any other Air or Aires Male or Female that fall happen to succeed to the said umquhile *Alexander*, *Adam* or *Elizabeth*, or any of them, in the Lands and Heritage, with the Profits of the said Marriage, with Power, &c. At *Edinburgh*, 1 April 1538.

General Retour of *Alexander Earl of Sutherland* to *Adam Earl of Sutherland*, his Great-grandfather, dated 12th January 1590.

N. B. Besides various private Deeds in which *Adam* is called Earl of *Sutherland*.

N U M B. III.

EXCERPTS from the Charters under the Great Seal, and Settlements of the Estates, &c. of the Earls of Sutherland.

Penult. Julii,
37 Dav. 2d.

CARTA dimidii thanagii de Formartine, Willielmo Comiti de Sutherland, et hæredibus suis masculis de suo corpore legitimè procreatis seu procreandis.

1 April, 1559.

Precept upon a Charter by *George Lord Gordon*, constituting *John Earl of Sutherland*, and his Heirs Male, his Depute Sheriffs of the County of *Inverness*, over the Bounds of the Earldom of *Sutherland*.

23 Nov. 1581.

Carta confirmationis cartæ feudifirmæ terrarum de Gauldwell, &c. concessæ per episcopum Cathanensem, Alexandro Comiti Sutherlandiæ, et hæredibus suis masculis de corpore suo legitimè procreatis seu procreandis; quibus deficient. seniori hæredum feminarum ipsius Comitissæ de corpore suo legitimè procreatis seu procreandis, absque divisione; quibus deficientibus, legitimis et propinquieribus hæredibus et assignatis dicti Comitis quibuscunque.—On the Earl's Resignation.

5 July, 1583.

Carta resignationis terrarum et batoniæ de Far, &c. Alexandro Comiti de Sutherland, sui hæredibus et assignatis.—On the resignation of *George Earl of Huntly*.—Reddendo dict. Comes hæredes sui masculi et assignati.

19 June, 1590.

Carta confirmationis cartæ per Georgium Comitem de Huntley Alexandro Sutherlandiæ Comiti, hæredibus suis et successoribus, Sutherlandiæ comitibus de officio vicecomitis vicecomitatus de *Inverness*, infra totam et integram patriam Sutherlandiæ.—Reddendo dictus Comes Sutherlandiæ, suique hæredes et successores.

29 April, 1607.

Carta amplissima resignationis Joanni Sutherlandiæ Comiti, suisque hæredibus masculis, inter ipsum et Dominam Annam Elphinston Sutherlandiæ Comitissam ejus sponsam legitimè procreatis seu procreandis; quibus deficient. suis hæredibus masculis de corpore suo legitimè procreandis; quibus deficient. Roberto Gordon suo fratri-germano, suisque hæredibus masculis de corpore suo legitimè procreandis; quibus deficient. Alexandro Gordon, etiam suo fratri-germano, suisque hæredibus suis masculis de corpore suo legitimè procreandis; quibus omnibus deficient. Adamo Gordon, filio legitimo Georgii Marchionis de Huntley, suisque hæredibus masculis quibuscunque hæreditarie: Totius et integri comitatus de Sutherland, ac omnium et singularum terrarum ejusdem, &c.—On the Earl's Resignation.—Ac etiam terrarum de Far, &c. which were resigned by the Earl, that the same might be united to the Earldom, which is done by this Charter;—which contains a *Novodamus*,—an Erection into a Regality; a Constitution of the Estate into a separate County, to be called the County of *Sutherland*; a Change of the Holding from Ward to Blanch;—all to be held in free Earldom and Regality, &c. for ever.

14 July, 1628.

Carta erectionis civitatis de Dornoch in unum liberum burgum regale; reservato tamen dilecto nostro consanguineo Joanni Sutherlandiæ Comiti, suisque hæredibus masculis et successoribus suæ, hæreditario jure dict. terrarum de Dornoch.

14 Sep. 1631.

Carta impignorationis Regalitatiss et Vicecomitatus, &c. de Sutherland dilecto nostro consanguineo Joanni Sutherlandiæ Comiti hæredibus suis masculis et assignatis quibuscunque redeemabiles per regem per solutionem unius mille

mille librarum Sterlingarum—This proceeds on a Contract between the King and the Earl, whereby the Earl *pro se, hæredibus suis et assignatis quibuscunque* resigned the Sheriffship in the King's Hands for the Payment of the said Sum—It also contains a new Erection of the Earldom into a Regality, &c.

Carta resignationis comitatus de Sutherland, et singularum terrarum dict. comitatus, &c. unit. in unam integram regalitatem, prædilecto nostro consanguineo Georgio Domini Strathnaver, filio legitimo natu maximo prædilecti nostri consanguinei Joanni Comitis de Sutherland, et hæredibus suis masculis, cognomen de Gordon utend. et insignia familiæ de Sutherland gerentibus et assignatis suis quibuscunque hæreditarie.—This proceeds on the Resignation of Earl John.

Carta resignationis et confirmationis, totius et integri comitatus de Sutherland, et omnium et singularum terrarum ejusdem, &c. prædilecto nostro Joanni Domino de Strathnaver, unigenito filio legitimo prædilecti nostri consanguinei Georgii Comitis de Sutherland, et hæredibus masculis legitime procreat. seu procreand. inter eund. Joannem Dominum Strathnaver et Dominam Helenam Cochrane ejus sponsam; quibus deficient. hæredibus masculis per dict. Dominum Strathnaver in quovis alio legitimo matrimonio legitime procreand. quibus deficient. dict. Georgio Comiti de Sutherland, et hæredibus masculis ex ejus corpore cum Domina Joanna Weemes Comitissa de Sutherland ejus sponsa, vel in quavis alio matrimonio legitime procreat. seu procreand. quibus deficient. hæredi femellæ natu maximæ legitime procreat. seu procreand. per dict. Joannem Dominum Strathnaver, cum præfat. Domina Helena Cochrane sua sponsa, sine divisione, et hæredibus masculis ex ipsius hæredis femellæ corpore legitime procreand. &c.—This proceeds on the Resignation of Earl George.

Carta resignationis tituli honoris et dignitatis Comitis Sutherlandiæ, et totius et integri Comitatus de Sutherland, et omnium et singularum terrarum ejusdem, &c. prædilecto nostro Willielmo Domino Strathnaver filio legitimo prædilecti nostri consanguinei Georgii Comitis de Sutherland et hæredibus masculis legitime procreandis inter illum et Magistram Catherinam Morison sponsam suam, quibus deficientibus hæredibus masculis legitime procreandis per dictum Willielmum Dominum Strathnaver ex quovis alio matrimonio, quibus deficientibus dicto Joanni Comiti Sutherlandiæ seipso et hæredibus masculis procreandis ex ejus corpore, quibus deficientibus seniori hæredi femellæ dicti Gulielmi Domini Strathnaver ejus corpore seniore semper succedente absque divisione et hæredibus masculis ex ejus corpore, &c.—This proceeds on the Resignation of John Earl of Sutherland, but is void *quoad* the Title, as not having been signed by the Queen.

N U M B. IV.

Proceeding on the Brieves of Ideocy at the Instance of Elizabeth Sutherland and Adam Gordon her Husband, against her Brother John Sutherland, Earl of Sutherland, in the Course of which the Earl declared his Sister, and her Issue, to be his Heirs.

IN Dei nomine Amen; per hoc presens publicum instrumentum cunctis pateat evidentur quod anno incarnationis Dominicæ millesimo quingentesimo decimo quarto die vero mensis Julij decima tertia indictione secunda Pontificatus Sanctissimi in Christo Patris et Domini nostri Domini Leonis divina providentia Papæ decimi anno secundo—In meique notarij; publici et testien. subscriptorum presentia, personaliter constitut. Honorabiles Viri Willielmus Scott de Balwery Miles et Alexander Reid de Straloch Vicicomites de Inverness ad exequend. breve seu breviam ideocitæ capellæ supremi Domini nostri Regis impetratum seu impetranda super Johan. Comite de Sutherland per literas commissionis Serenissimi et Excellentissimi Domini nostri Regis specialiter creati constituti et nominati supra scriptum officium Vicicomites de Inverness in se et super se receperunt conjunctim acceptarunt nec non hujusmodi officio fungi in eodemque debite ministrare juxta contenta in dicta commissione in curia Vicicomitis de Perth ex mandato et autoritate Honorabilis Viri Roberti Boonckle unius balivorum burgi de Perth per literas patentes supremi Domini nostri Regis suo signeto ex deliberatione Dominorum concilij roboratas et fulminatas ad hæc facultatem habentes et in sua presentia jurarunt ac corporalia prestiterunt juramenta prout quilibet eorum ad supra scriptum officium sigillatim jurat et corporale juramentum præstat et exactis præmissis supra scripti Vicecomites curia. Vicecomitat. de Inverness per Johannem Mathison pro tunc unum marorum ejusd. affirmari et inchoari fecerint et solemniter ordinarint in quia supra scripta commissione et breve desuper direct. et apud crucem feralem burgi de Inverness de prius per Jacobum Fidler etiam unum officiariorum et marorum supra script. Vicecomitates de Inverness in hac parte palam proclamatum et proclamatum et debite indorsatum per lege et per publicam proclamationem ad fenestram pretorij burgi de Perth omnibus et singulis interesse habentibus de super fieri causarunt mandarunt et judicialiter proclamarunt quod circa *illis* contra supra scriptum breve pro tunc deserviturum dicto die objecturus comparentibus supra scripti Vicecomites processerunt et condignam inquisitionem super contentis in dicto brevi cognoscendam et determinandam in presentia supra scripti Comitis de Sutherland eligerunt et jurare compulserunt solemnitatibus juris interum mediantibus et statim antedict. vicicomites ante egressum sive exitum dominorum dictæ inquisitionis extra curiam præscriptum Dominum Comitem de Sutherland qui sibi et sui hæreditati deficientibus hæredibus de corpore suo legitime procreandis succedere et jure hæreditariis terris et possessionibus suis hæreditarie gaudere tenentur, examinarunt, postularunt et viva voce accularunt qui dominus comes palam et judicialiter declaravit quod Elizabeth Sutherland sua soror germana et sponsa Adæ Gordon et suæ proles idone procreati et procreandi deficientibus hæredibus de corpore suo legitime procreandis sibi et suæ hæreditati sunt proprie et immediate successur. et post suum decessum eisd. gavisor. et ad hæc suum plenarium consensum præbuit et assensum prout per tenorem hujus instrumenti animo non variandi prebet, et quia dictus dominus Comes naturalis intellectus debilis existit et est ob id summè expectabat ne sua hereditas in toto vel in parte alienaretur seu dissiparetur licentia supremi domini nostri Regis obtinenda elegit et nominavit super scriptam Adam Gordon sponsum supra scriptæ Elizabeth sororis suæ et Johannem Sutherland Burghensem de Elgin rerum suarum potentes et providos ejus curatores et ad regend. ac gubernand. se ac terras et possessiones suas quascunque bonaque sua mobilia et immobilia presentia et futura ita quod dict. curatores eum honorifice sustentent in victu et vestitu prout jura cavent. Super quibus omnibus et singulis a me notario publico subscripto magister David Seton canonicus Aberdon. prolocutor dicti Adæ Gordon sibi fieri et exhiberi petiit unum seu plura publicum seu publica instrumentum seu instrumenta.—Acta erant hæc in preterio burgi de Perth virtute dispensationis regis hora decima ante meridiem vel eo circa sub anno die, mense, indictione et pontificatus supra scriptis presentibus ibid nobilibus et prepotentibus dominis Willielmo Comite de Errol, Johanne Comite de Athole, venerabili patre Gaivino postolato de Arbroth, nobilibus dominis Willielmo domino Ruthven, Johanne domine Glamis, Gilberto Gray de Buttergask et Thoma Charters de Kinfawns cum multis alijs testibus ad premissa omnia et singula rogatis et requisitis.

Memorandum—There is a notorial Docquet to the Instrument signed by Robert Thomas, Notary public, Presbiter of the Diocess of Brechin, *Sacra apostolica et imperiali auctoritatibus not. publicis.*

N U M B. V.

FIRST CLASS.

INSTANCES, where the Estate stood limited simply to HEIRS (*hæredibus suis*) at the Time of the Creation of the Peerage.—And where afterwards, upon the Failure of the Male Line the Heir General took the Estate, and the Peerage extinguished.

Lovat Papers—ANSWERS to Condescendence, p. 31.

LORD HALLYBURTON of DIRLETON—appears, for the first Time, in the Rolls of Parliament.—20 November 1469.

N. B. This Peerage extinct before 1529.

Charter of the Barony of DIRLETON to Patrick the Son and Heir apparent of John Lord Hallyburton, *et hæredibus suis*,—25 March 1451.

Charter of the Lands of Lambden and Lordship of Hallyburton to Patrick and Margaret his Wife.—*Et hæredibus inter ipsos legitime procreandis; quibus forte deficientibus dicto Joanni et hæredibus legitimis et propinquieribus ejusdem Joannis Domini de Hallyburton quibuscunque*.—28 March 1451.

Charter confirming a Charter by "Janeta Hallyburton seniore filia et una hæredum quondam Patricii Domini Haliburton de Dirleton cum consensu Willielmi Magistri de Ruthven sponfi sui,"—of the Lands of Lambden, 3 September 1529.

Record of Great Seal, James II. Book 4. No. 140. Same Book, No. 144.

Book 25. No. 92.

Ditto

32. Roll of Parliament, 153. Records of Chancery, Book 10. No. 147. Ditto. Book 13. No. 347, 390.

LORD HERRIES.—7th Feb. 1491, Lord Herries, for the first Time, appears.

Charter of the Barony of Terregles, the Family Estate, *hæredibus suis*.—1 June 1491.

Charter Herberto Domino Herries, *hæredibus suis*.—4 June 1493.

Charter of Terregles, Andrae filio Herberti Domini Herries, *et hæredibus suis*.

This Peerage extinct by the Death of William third Lord Herries, 26 September 1543.

Charter Joanni Magistro de Maxwell et Agnatæ Herries, *sponsæ suæ*,—eldest Daughter, and one of the three Coheiresses of William Lord Herries, 1553.

Charter Joanni Maxwell de Terregles Equiti aurato et Dominae Agnetæ Herries, *sponsæ suæ*, 1556.

This Peerage revived in 1566 or 1567.

Charter, 8 May 1566, to Sir John Maxwell, Knight, and Dame Agnes Herries his Spouse, of the Barony of Terregles, erected into a Barony and Lordship to him, and the Heirs Male of the Marriage, &c.

John Lord Herries sat in Parliament 16th April 1567.

SECOND CLASS.

INSTANCES, where the Estate stood limited simply to Heirs (*hæredibus suis*) at the Time of the Creation of the Peerage, and where the Heir Male succeeded to the Peerage, in Preference to the Heir General or of Line.

EARL of CASSILLIS.—That the Estate was limited simply to Heirs at the Time of the Creation, appears from the Writings produced before your Lordships in the Competition about that Peerage. And your Lordships Judgment gave the Peerage to the Heir Male, in Preference to the Heir General.

Lord Lovat's additional Condescendence, p. 8. B. 7. No. 105.

EARL of ERROL.—Called for the first Time an Earl in a Charter dated 24 Feb. 1455.

Charter to Nicholas Earl of Errol, *et hæredibus suis*, 31 January 1466.

The Earl of Errol appears in the Parliament Roll, 20 November 1469.

Charter—Wilielmo Comiti & sponsæ suæ, &c: *hæredibus inter ipsos; quibus deficient. veris legitimis & propinq. hæredibus dicti Comitis quibuscunque*.

Carta officii; vicecomitis Wilielmo Comiti Errolæ & hæredibus suis.

— 17 Jun. 1512, *hæredibus suis*.

— 21 March, 1512, Ditto.

— 21 October, 1530, Ditto.

Charter of the Constabulary to George, as Heir Male to William Earl of Errol, *et hæredibus masculis cum cognominibus de Hay in omnibus temporibus futuris, prout fuerunt in temporibus elapsis*.

This George Earl of Errol (so called in a Charter 1555) excluded Jean the Grand-Daughter of Earl William—as appears from a Charter of Confirmation, 23 June 1562, wherein she is described, *Nepti et hæredi lineæ quondam Wilielmi Comitis de Errol*.

N. B. Another Instance of the Exclusion of a Female occurs likewise in this Family.

EARL of ROTHES.—The Earl of Rothes appears first in the Parliament Roll, 20 Nov. 1469. Ja. III. Book 3d, Folio 57.

Charter to the Earl—*et hæredibus suis*, 8 Feb. 1475.

Charter 4 July 1663, upon the Resignation of John Earl of Rothes—to himself, *et hæredibus masculis de corpore suo legitime procreandis*. Quibus deficientibus, hæredi fæmelli procreatis seu procreandis de corpore dicti Comitis, vel de corpore ejus hæredum masculorum, absque divisione, totum et integrum dicti comitis de Rothes titulum, honorem et dignitatem comitis de Rothes, &c.

EARL of GLENCAIRN.—28 May 1488—Created Earl.

Charter to Earl Cuthbert and Hariot his Wife in Life-rent—and to William Cunningham their Son—*et hæredibus suis*—27 August 1511.

Retour of the special Service of John Earl of Glencairn, as Heir-male of the deceased Alexander Earl of Glencairn, his Brother German—29 September 1670.

22. B. 17. No. 86.

Retour of the special Service of Lady Margaret Cunningham, only Daughter of the deceased Alexander Earl of Glencairn, and of Mrs. Catharine Stuart—to Sir James Stuart—18 August 1685.

N. B. In the *Lovat Papers*, this Lady Margaret, the Heir of Line, is referred to as then Countess of Lauderdale, and her Relation mentioned as a Fact known to the whole Kingdom, and not contradicted.

N. B. The Earl of *Bothwell* created at the same Time—Estate likewise then limited, *hæredibus suis*.

Lord Lovat,

Ans. p. 25. **EARL STRATHERN**—Charter from King Robert II. *Carissimo filio suo domino David Senescallo militi et hæredibus suis*.

Euphame, the only Child of Earl David, was married to Sir Patrick Graham—And in the Absence of King James I. the Lady and her Husband assumed the Dignity, as did their Son *Malise*.

But upon the Return of the King from England, the Earldom was resumed (the Enjoyment of *Euphame* and her Son being considered as Usurpation) and granted by the King to his Uncle *Walter Stuart*, Earl of *Atboll*, by Charter 22d July 1427.

Buchanan's Account of this Matter is in the following Words—"Interea Malifus Gramus a Rege, dum in publicum patrimonium diligentius inquiri, IERNIA est spoliatus, quod eum comperisset Avo ejus materno ea lege datum ut deficiente stirpe mascula ad Regem rediret, secundumque esset masculinum ut interpretes juris nunc loquuntur."

Roll D. Albany,
No. 15.
15 Dec. 1412.

11st Memorial,

B. 12. No. 234. **LORD ROSS**—Charter, 27 September 1490, Joanni Rofs de Melville et Christinæ Edmonston, &c. et hæredibus inter ipsos quibus deficientibus veris legitimis et propinquieribus hæredibus Joannis.

—Joanni Rofs de Halkhead hæredibus suis et assignatis.

Charter, 25 August 1499—Joanni Rofs de Melwyn milite hæredi apparen. Joannis Domini Rofs de Halkhede hæredibus suis quibus deficientibus dicto domino hæredibus quibuscunque.

Confirmatio donationum per quond. avum et patrem regis, &c.—Joanni Domino Rofs et hæredibus suis.

Charter—Joanni Domino Rofs et hæredibus suis et assignatis—4 March 1502.

Charter—Do—Do—12 Feb. 1505.

Do—Do—Hæredibus suis—21 Feb. 1508.

Retour of the Service—Willielmus nunc Dominus Rofs quam legitimus et propinquier hæres masculus quondam Roberti Domini Rofs fratris nepotis sui.

Retour, 6th Feb. 1649. Jane Lady *Wauchton*, and Mary Lady *Innes*, as Heirs Portioners and of Line to Robert Lord Rofs, their Brother German.

— 12. No. 269.
17 Feb. 1490.
B. 13. No. 490.

— No.
11 March 1501.

— 527.

B. 14. No. 178.

B. 15. No. 75.

Retour Book 19.

p. 315.

20 March 1649.

B. 19. fol. 312.

Roll. 2. No. 25. **LORD GRAY**—Carta Patricio Gray et Margaretæ sponse et hæredibus inter ipsos legitime procreatis quibus deficientibus hæredibus dicti Patricij quibuscunque—11 Feb. 1372.

Carta—Patricio et hæredibus suis—23 Feb. 1381.

Andreas Dominus de Gray, mentioned in a Charter 19 August 1450.

Charter—Patricio filio Andrea Domini Gray et Annæ sponse et hæredibus inter ipsos legitime procreatis quibus deficientibus hæredibus dicti Patricij legitimes quibuscunque.

Charter—Officij Vicecomitis de Forfar Andrea Domino et hæredibus suis, 14 December 1488.

—Andrea Domino—Rupis de Bruchty—hæredibus suis—26th June 1499.

8 January 1628—Patent to Andrew Lord Gray, reciting—Nunc autem cum nobis constiterit memoratum Andream Dominum Gray destitutum filio masculo, &c. et uniam habere filiam, &c.—Andream Dominum Gray amicorum suorum consilio dispensam unicam illam filiam suam, &c. vero sui cognominis et ex sua familia habere Gulielmo Gray juniore, &c. damus, &c. præfato Gulielmo Gray juniore ejusque hæredibus masculis, &c. titulum, stilum, &c.

Roll. 5. No. 85.

B. 4. No. 63.

— 6.—27.

B. 12. No. 97.

B. 12. No. 231.

B. 56. No. 71.

Memorial,

Roll. 2. No. 50. **LORD FLEMING**—Charter to Malcolm Fleming et hæredibus suis—20 June 1374.

Malcolmo Fleming et hæredibus suis—20 September 1382.

Roberto Fleming—hæredibus suis—6 June 1451.

—Do—Do 7 June 1451.

—Do—Do 5 March 1451.

Do—Malcolmo Fleming, filio et hæredi apparenti Roberti Domini Fleming et hæredibus suis, 31 Aug. 1472.

Charter—Joannis Domino Fleming et Euphemie ejus sponse Bartonie de Thankerston—et hæredibus inter ipsos; quibus deficient. veris legitimis et propinquieribus hæredibus dicti Joannis quibuscunque—5 May 1496.

Joanni Domino Fleming—hæredibus suis—8 May 1509.

Do—Biggar and Thankerston—hæredibus suis—8 May 1509.

Malcolmo Domino—hæredibus suis. 12 August 1525.

Do—Do Do 8 August 1527.

Do. et Janetæ forori regis—et hæredibus inter ipsos; quibus deficient. legitimis et propinquieribus hæredibus dicti Malcolmi quibuscunque—28 October 1527.

Do.—Malcolmo Domino Fleming et hæredibus suis—16 October 1531.

Malcolmo Domino Fleming et hæredibus suis—8 May 1534.

Do—Do 1 July 1534.

Do—Do 22 November 1534.

Do—Do 26 September 1535.

Do. et Janetæ Stuart—et hæredibus inter ipsos; quibus deficient. legitimis et propinquieribus hæredibus dicti Malcolmi—11 July 1537.

Malcolmo Domino Fleming et hæredibus suis—9th April 1538.

Malcolm Lord Fleming and his Spouse, and Heirs to be procreate between them; which failing, to his Heirs and Assigns, 22d April 1539.

Malcolm Lord Fleming—et hæredibus suis—18 June 1541.

Joanni Domino Fleming, filio Malcolmi et Janetæ Stuart; et hæredibus masculis dicti Domini, reverten. 19 November 1541.

Joanni

Roll. 7. No. 24.

— 219.

— 220.

— 221.

— 246.

— 13.—218.

— 17. No. 68.

— 19.—81.

— 21.—160.

— 22.—38.

— 23.—111.

— 24.—121.

B. 25. No. 133.

— 142.

— 160.

— 275.

— 26.—18.

— 150.

— 281.

— 27.—233.

— 28.—75.

— 31. — 578.
— 35. — 849.

Joanni Flemyng fratri Jacobi Domini Fleming—*hæredibus suis*—17 January 1557.
Charter to Mr. John Maitland of Thirlestane and Mrs. Jane Flemyng his Wife, of the Lands and Barony of Thankerston and Biggar, of an annual Rent of 40l. out of the Lands of Kerse—"Quæquidem omnes et singule terre Barronia et annuus redditus, &c. præfatæ magistræ Joannæ Flemyng nepti et hæredi quondam Malcolm Domini Fleming sui avi de eisdem perprius hæreditarie pertinuerunt." 30 October 1583.
In 1606 this Family was raised to the Dignity of Earl—In 1743 Charles last Earl of Wigton succeeded his Brother Earl John to the Exclusion of Earl John's Daughter Lady Clementina—and since, by the Death of Earl Charles the Family Estate has gone to Lady Clementina.

And the Honours are claimed by a distant collateral Heir Male.

B. 4. No. 153. LORD SEMPILL—Charter, Roberto Sympil *hæredibus suis*—31 October 1451.

— 7. No. 284.
& 306.
Roll. 7. fol. 19.
B. 14. No. 155.

Charter, Willielmo Sympel—*hæredibus suis*.

18 March 1503—Lord Sempil appears for the first Time in the Roll of Parliament.

Charter, 21 September 1505—*Hæredibus suis*.

Upon the Death of Robert Lord Sempil, without Issue Male, a Patent was obtained—25 July 1685, upon the Resignation of Robert Sempil, the Heir Male of Lord Robert, granting this Peerage to Anne Sempil, Lord Robert's Daughter, and her Heirs Male, by her then Husband Francis Abercrombie of Fetternicar—Who by the same Patent is created Lord Glasfurd for Life.

Lovat's Additional
descendence, p. 21.

DUKE of LENOX.

(Earl Hadinton's Collection, Fol. 460.)

Constitution of the Earldom of Lenox in a Dukerie. 5th August, 1581.

To Esme Earl of Lenox, &c. and his Heirs, charging all and sundry Earls, Lords, Barons, &c. to acknowledge and reverence his said dearest Cousin, according to the Stile, Title, Place before specified; ordering him to be invested therein with all Solemnities requisite.

Retour of the Service of King Charles II. as nearest Heir Male to Charles Duke of Lenox.

Ditto of Catherine Lady Obrian, as Heir of Line to her Brother, the said Charles Duke of Lenox.

1680, July 6th.
1678, Dec. 4th.
Lovat's 1st Memorial,
2.

B. 4. No. 162. LORD HAY of YESTER.—Davidi Hay de Yester quartæ partis de Yester, *hæredibus suis*.—12th Jan. 1451.

B. 13. No. 424.
— 15. No. 194.
— 18. — 21.

Joanni Domino Hay, *hæredibus suis*.—12th Sept. 1500.

Do. et sponsæ—*Hæredibus inter ipsos; quibus deficientibus hæredibus quibuscunque*.—7th Oct. 1509.

Joanni Hay de Yester filio et hæredi quondam Joannis Domini Hay de Yester et *hæredibus suis*.—2d Feb. 1511.

"Joanni Domino Hay de Yester et *hæredibus suis*"—of Half of the Barony of Yester.—10th Nov. 1512.

Joanni filio et hæredi Joannis Domini Hay de Yester, et Eliz. Livingston, &c. et *hæredibus inter ipsos; quibus deficientibus legitimis et propinquieribus hæredibus dicti Joannis quibuscunque*.—18th Oct. 1533.

Charter to William Lord Hay of Yester, and the Heirs Male of his Body, of his whole Estate; whom failing, to James Hay, his Brother-german, and the Heirs Male of his Body; whom failing, to several other collateral Heirs Male; containing a Clause, That in respect his Daughters had been excluded of their Birth-right to the Lands and Estate by the Heirs Male and of Taillie not of his own Body, he obliged such Heir Male, not of his own Body, to pay certain Provisions therein mentioned to his Daughters.—Penult. Feb. 1591.

B. 37. No. 494.

Charter of Confirmation, mentioning James Lord Hay of Yester—6 September 1592.

B. 7. fol. 291.

Retour of the Service of Alexander Horfebrugh, Son of Jean Hay, one of the Daughters of William Lord Hay of Yester, as Heir of Line to his Grandfather.

17th May 1620.
Lovat's 1st Memorial,

B. 1. No. 152.

LORD LINDESAY OF THE BYRES.—Charter of Byres to William Lindeſay, et *hæredibus suis*, 17 January 37. Reg. Dav. Bruce.—1366.

Lord Lindeſay—in Parliament Roll, 6 March 1457.

Charter to John Lord Lindeſay and Marriot his Wife—Et *hæredibus inter ipsos legitimè procreatis seu procreandis. Quibus deficientibus, veris legitimis et propinquieribus hæredibus dicti Joannis quibuscunque*.

B. 1. fol. 37.
B. 13. No. 192.
8 Nov. 1495.

Charter on Lord John's Resignation, of "Terrarum et domini de Byres, &c. Patricio fratri Joannis Domini de Byres, et *hæredibus suis*."

Charter—Patricio Domino de Byres, et *hæredibus suis, domini de Byres, &c.*

Retour of the Service of "Robertus nunc Dominus Lindeſay de Byres, tanquam legitimus et propinquier hæres masculus quondam Joannis Domini Lindeſay de Byres fratris sui"—To the Exclusion of Anne Lindeſay, Lord John's Daughter, the Wife of Alexander Falconer of Halkerton.

B. 13. No. 287.
28 Oct. 1497.

B. 15. No. 19.

1 Dec. 1508.

Retour in

Chancery.

B. 14. p. 259.

Great Seal

Record.

B. 49. No. 150.

THIRD CLASS.

INSTANCES where the Estate stood limited to Heirs whatsoever, at the Time of the Creation of the Peerage.—And where afterwards an Heir Male succeeded to the Peerage, in Preference to an Heir General or of Line.

EARL of ANGUS.—Lady Margaret Stuart succeeded her Father Thomas Earl of Angus in the Estate or Territory of Angus, as appears from a Royal Charter in 1379, wherein she is described, *eldest Daughter and only Heir of the late Thomas Earl of Angus*. This Lady was first married to the Earl of Mar, and after his Death, to William, first Earl of Douglas, to whom she had a Son called George.—The Earl of Douglas was dead before 1384, as appears from a Deed in the Aberdeen Cartulary.

In 1389, she, under the Description of Countess of Mar (not of Angus) resigned the Estate of Angus in Favour of her Son, called George Douglas, Lord of Angus.—Et *Hæredibus suis*.

Of 24 May 1397, George Douglas, Lady Margaret's Son, entered, with his Mother's Consent, into a Contract of Marriage with Lady Mary, Daughter to King Robert the Third.

And after the Peerage had been extinct for upwards of twenty Years, it was revived in the Person of this George, as appears by a Charter, 24th May 1398.—*Dilecto filio nostro Georgio Douglas Comiti Angulæ et Mariæ sponsæ suæ, filiæ nostræ carissimæ et hæredibus inter ipsos.*—And that Lady Margaret outlived her Son, this George Earl of Angus, appears from a Contract (mentioned in the Lovat Papers) which she entered into for the Marriage of her Grandson, William Earl of Angus, 1410.

N. B. Two subsequent Exclusions of Heirs General occur in this Family.

Personal Condescendence EARL of MORAY.—The Earl of Moray, Regent of Scotland, was created Earl of Mar 7 Feb. 1561—to him and his Heirs Male—which he changed afterwards for the Title of Earl of Moray.

1 Jan. 1566—the Regent obtained a Charter of the Earldom of Moray—*legitimis et propinquieribus hæredibus seu assignatis dicti comitis quibuscunque.*

1570, Jan. 23d.
1580, Jan. 5th.

He was killed 23d January 1570.

King James granted—"To James Stuart, Son and Heir Apparent of Sir James Stuart of Down, Knight, &c. the Gift of the Ward of all Lands, &c. which pertained to his Majesty's dearest Uncle James Earl of Moray, Lord Abernethy, Regent to his Highness, &c. TOGETHER with the Marriage of Elizabeth and Margaret Stuarts, Daughters and Heirs of the said umquhile James Earl of Moray."

On 29th of same Month, this James Stuart married the eldest Daughter Elizabeth.

Then, or soon after, he was created Earl of Moray—for he is so called in a Charter 25 April 1581.

And in 1700, Charles, a second Son, succeeded his Father Alexander Earl of Moray to the Exclusion of the Daughters of the elder Brother James Lord Downe.

Lovat's Additional
Condescendence, p. 6.
B. 7. No. 36r.
R. of C. B. 7.
No. 39.

EARL of CAITHNESS.—Charter of the Earldom, *hæredibus quibuscunque.*

Patent of Earl of Caithness to John Campbell of Glenorchy, proceeding on a Recital, "*Nos considerantes demortuum Georgium Comitem Cathaniæ, apud se statuisset et designasset, defuncti. hæredibus masculis ex ejus corpore, titulum, honorem et dignitatis Comitis Cathaniæ collocatum iri post ejus obitum in dilectum nostrum Joannem Campbell de Glenorchy.*"

Afterwards the Title claimed and adjudged to the collateral Heir Male of Earl George, though he left a Sister Jean, married to Sir James Sinclair of May.

And John Campbell of Glenorchy was created Earl of Breadalbane.

—180.
13 August 1681.

N. B. Another Instance has occurred in the same Peerage lately, upon the Death of the last Earl, whose only Daughter, the present Countess of Fife, makes no Claim to the Peerage; and two Persons, each assuming the Character of next collateral Heir Male, are now contesting their Pedigree before the Court of Session, in order to lay the Foundation of the Right to this Peerage.

LORD LOVAT.—That the Family Estate stood limited to Heirs whatsoever, at the Time of the Creation, appears from the Decree of the Court of Session in Favour of the late Lord Lovat, Anno 1729.

And it likewise appears from the said Decree, that Lord Lovat the Heir Male was preferred to the Heir General or of Line.

B. 32. No. 230. LORD BOYD.—Charter—Roberto Boyd de Glen—et hæredibus suis.—28 Feb. 1547.

—426.

Charter confirming a Charter from Robert Master of Boyd—Nobili Dominæ Margaretæ Colquhoun sponsæ nobilis Domini Roberti—Domini Boyd patris sui.—11th Feb. 1548.

Lord Boyd appears in the Parliament Roll, 29th November 1558.

Robert Lord Boyd died without Issue, 17th November 1641, leaving several Sisters, and was succeeded in the Peerage by his Uncle James Lord Boyd.

Who upon 10th April 1641, is, under the Description of James Lord Boyd, served—*tanquam legitimus et propinquior hæres masculus quondam Roberti Domini Boyd nepotis sui.*

And 1st November 1641, Mariot Boyd, lawful Daughter of the late Robert Lord Boyd, one of Lord Robert's Sisters, was infeft in her Jointure Lands, upon her Marriage with Sir James Dundas of Arncliffe.

N. B. Sir Robert Gordon considering the general Proposition, That the legal Presumption of the Limitation of the Descent of ancient Peerages without Patent, in Favour of Heirs Male, is established, has confined his Instances to the Cases where the Estate at or about the Time of the Creation, stood limited to Heirs simply, or to Heirs whatsoever.—And for the other numerous Instances of Male Succession in ancient Peerages to the Exclusion of Females, he humbly refers to the adjudged Cases, where these Instances are stated, as well as for the Constitution and Descent, so far as they are known of the more ancient Titles and Dignities of Scotland, such as Fife, Mar, Ross, and several others, mentioned in the Lovat Papers.

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C A S E

O F

Sir ROBERT GORDON, Bart.

(Claiming the Title, Honour and Dignity of)

EARL of SUTHERLAND.

To be heard at the Bar of the HOUSE of LORDS, upon
Thursday the 16th Day of *March*, 1769.

lg 1139. (s.)